Filed 1/31/19 In re Hailey M. CA5

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

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| In re HAILEY M., a Person Coming Under the Juvenile Court Law. | |
| STANISLAUS COUNTY COMMUNITY SERVICES AGENCY,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>T.T.,<br><br>Defendant and Appellant. | F078060<br><br>(Super. Ct. No. 518099)<br><br>**OPINION** |

APPEAL from an order of the Superior Court of Stanislaus County. Ann Q. Ameral, Judge.

Robert McLaughlin, under appointment by the Court of Appeal, for Defendant and Appellant.

John P. Doering, County Counsel, and Maria Elena R. Ratliff, Deputy County Counsel, for Plaintiff and Respondent.

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## INTRODUCTION

On October 10, 2017, the Stanislaus County Community Services Agency (agency) filed a petition pursuant to Welfare and Institutions Code section 300,[1] alleging that T.T. (mother) was incarcerated and unable to care for her newborn child, Hailey M. Hailey was detained the next day. On October 13, 2017, an amended petition was filed alleging that mother suffered from chronic substance abuse, failed to properly care for Hailey, failed to bond with Hailey, lacked suitable housing, failed to cooperate with a safety plan, was involved in an adoption scam, and remained incarcerated. The agency alleged mother had failed to successfully reunify with another child seven years previously and sought to bypass providing mother with reunification services. Mother filed a form indicating she did not have Native American ancestry.

At the jurisdiction hearing on November 1, 2017, the juvenile court found the allegations of the petition true and that the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901, et seq.) did not apply. At the disposition hearing on February 9, 2018, the juvenile court found the bypass provisions of section 361.5, subdivisions (b)(10) and (b)(11) applicable and denied mother reunification services. Mother was about to be transported to state prison.

On August 6, 2018, the juvenile court conducted a hearing pursuant to section 366.26 (.26 hearing) terminating mother's parental rights to Hailey and finding her suitable for adoption.[2] Prior to this hearing, which had been continued, and late in the proceedings, mother and grandmother came forward with information that they believed the family had Native American ancestry. Notices to several tribes had been

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[1] Unless otherwise designated, statutory references are to the Welfare and Institutions Code.

[2] No alleged father is a party to this appeal nor has an alleged father asserted Native American Ancestry.

sent prior to the disposition hearing, as well as after the hearing, but the .26 hearing was conducted prior to the tribes responding to notices filed pursuant to the ICWA.

On appeal, mother contends the juvenile court erred in terminating her parental rights before the 60 days had elapsed for Indian tribes to respond to the ICWA notices. Mother argues we must conditionally reverse the juvenile court's order terminating her parental rights and remand the case for further proceedings to assure compliance with the ICWA notice requirements. The agency argues that under the ICWA and the Welfare and Institutions Code, it can conduct a hearing provided a potentially affected tribe has 10 days' notice of a hearing. The agency argues that our court cannot consider a third notice sent to potentially affected tribes because this notice was sent after the juvenile court had conducted the .26 hearing. We agree with mother that the juvenile court's order terminating her parental rights must be conditionally reversed and the case remanded for the juvenile court to ensure compliance with the ICWA.

**ICWA PROCEEDINGS**

At the beginning of dependency proceedings, mother filed a document indicating she was unaware of having any Native American ancestry. The .26 hearing was continued to June 20, 2018.[3] At the hearing, mother indicated she had learned from her grandfather that she was Black Hawk Indian. A maternal aunt present at the hearing interjected that the heritage was Blackfeet, Sioux Indian.[4] The court continued the hearing. Mother filed a form stating that she was Blackfeet and Sioux Indian. Notices of the permanency planning hearing set for August 6 were sent on July 3 to the Blackfeet tribe, 17 branches of the Sioux Tribe, and the Bureau of Indian Affairs (BIA).

[3] Subsequent references to dates are in 2018.

[4] Mother and her relatives used the term Blackfoot Indian, but the tribe is officially known as Blackfeet.

On July 12, new notices of the August 6 hearing were sent to the BIA, Sioux Tribes, Blackfeet Tribe, the Chickasaw Tribe, and three branches of the Cherokee Tribe. The juvenile court conducted the .26 hearing on August 6. The court noted it was unknown if the ICWA applied and found it may apply. All of the green return receipt cards indicating notice of the hearing had been received had been returned.

The court denied mother's petition pursuant to section 388 to modify its earlier orders concerning mother not receiving reunification services. The court found termination of parental rights would not be more detrimental than the benefit of permanency for the child through adoption. The court found by clear and convincing evidence that Hailey was adoptable and terminated the parental rights of the parents. The case was set for an adoption review hearing in January 2019. A maternal relative requested to be considered for custody of Hailey. The relative was being evaluated for the child's placement. A further hearing was conducted for this relative on August 27.

On August 27, a new ICWA notice was sent about the January 2019 hearing to the aforementioned tribes plus three branches of the Choctaw Tribe. The clerk's transcript includes three pages of family genealogy. Several relatives are listed in the genealogy. One relative was believed to be Chickasaw Indian; one was listed with Blackfeet, Chickasaw, Choctaw, and Cherokee ancestry; and another group of maternal relatives were believed to have Sioux and Blackfeet ancestry. The information provided the dates and places of birth for these ancestors.

## ANALYSIS

Mother contends that notice requirements under the ICWA were not properly followed. The agency argues that because the tribes had more than 10 days' notice prior to the .26 hearing, the juvenile court had jurisdiction to continue with the proceedings, including the permanency planning hearing.

Congress enacted the ICWA to promote the stability and security of Indian tribes and families by establishing minimum standards for removal of Indian children from their

families and the placement of such children in foster or adoptive homes that will reflect the unique values of Indian culture. (*In re C.Y.* (2012) 208 Cal.App.4th 34, 39; *In re Levi U.* (2000) 78 Cal.App.4th 191, 195 (*Levi U.*).) An " 'Indian child' is defined as a child who is either (1) 'a member of an Indian tribe' or (2) 'eligible for membership in an Indian tribe and … the biological child of a member of an Indian tribe ….' (25 U.S.C. § 1903(4).)" (*In re Jonathon S.* (2005) 129 Cal.App.4th 334, 338 (*Jonathon S.*).) The ICWA applies only to federally recognized tribes. (25 U.S.C. § 1903(8); *Jonathon S.*, *supra*, at p. 338; *In re B.R.* (2009) 176 Cal.App.4th 773, 783 [federal definition of "Indian" includes "Eskimos and other aboriginal peoples of Alaska"; see 25 U.S.C. § 479]; *In re Wanomi P.* (1989) 216 Cal.App.3d 156, 166–168 [Canadian tribe is not federally recognized tribe under the ICWA].)

In state court proceedings involving the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe have the right to intervene at any point in the proceeding. (25 U.S.C. § 1911(c).) However, unless the tribe is notified of the proceedings, this right is meaningless. (*In re Hunter W.* (2011) 200 Cal.App.4th 1454, 1466 (*Hunter W.*).) Notice serves the dual purpose of (1) enabling the tribe to investigate and determine whether a child is an Indian child and (2) advising the tribe of the pending proceeding and its right to intervene. (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 470 (*Desiree F.*).)

The ICWA was enacted by Congress with the intent to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families" (25 U.S.C. § 1902). Consequently, in every dependency proceeding, the agency and the juvenile court have an "affirmative and continuing duty to inquire whether a child … is or may be an Indian child …." (Former § 224.3, subd. (a);[5] see Cal. Rules of Court,

[5] All references in this opinion are to the statute as it existed prior to January 1, 2019. (Stats. 2018, ch. 833, § 7, eff. Jan. 1, 2019.)

rule 5.481(a); *In re W.B.* (2012) 55 Cal.4th 30, 53; *In re Gabriel G.* (2012) 206 Cal.App.4th 1160, 1165 (*Gabriel G.*).) The agency must include in the notice all known names of the Indian child's "biological parents, grandparents, and great-grandparents, or Indian custodians, including maiden, married and former names or aliases, as well as their current and former addresses, birthdates, places of birth and death, tribal enrollment numbers, and any other identifying information, if known." (Former § 224.2, subd. (a)(5)(C);[6] see Cal. Rules of Court, rule 5.481(a)(4)(A) and Judicial Council form ICWA-030.)

Once the court or agency "knows or has reason to know that an Indian child is involved … [it] is required to make further inquiry regarding the possible Indian status of the child, and to do so as soon as practicable, by interviewing the parents, Indian custodian, and extended family members to gather the information required in paragraph (5) of subdivision (a) of Section 224.2." (§ 224.3, subd. (c); see Cal. Rules of Court, rule 5.481(a)(4); *Gabriel G.*, *supra*, 206 Cal.App.4th at p. 1165.) "[I]f the court [or] social worker … subsequently receive[] any information required under paragraph (5) of subdivision (a) of Section 224.2 that was not previously available or included in the notice issued under Section 224.2, the social worker … shall provide the additional information to any tribes entitled to notice under paragraph (3) of subdivision (a) of Section 224.2 and the Bureau of Indian Affairs." (§ 224.3, subd. (f).)

The agency makes a statutory argument that provided the tribes have 10 days' notice of a hearing, the juvenile court can proceed with a case. Where there is an involuntary proceeding in a state court and the court knows or has reason to know an Indian child is involved, 25 U.S.C. section 1912, subdivision (a) provides that notice shall be given to the tribe and: "No foster care placement or termination of parental rights

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[6] All references in this opinion are to the statute as it existed prior to January 1, 2019. (Stats. 2018, ch. 833, § 5, eff. Jan. 1, 2019.)

proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding." Subdivision (d) of section 224.2 mirrors this language, requiring 10 days' notice to a tribe of a hearing and granting up to 20 additional days for the tribe to prepare for the hearing. California Rule of Court rule 5.482(c)(3) further provides: "The court is not required to delay proceedings until a response to notice is received."

Based on these statutes and rule of court, the agency argues that the juvenile court did not have to wait 60 days for the tribes to all respond and the court retained jurisdiction to make rulings affecting the case. There are several problems with the agency's analysis. The federal and state statutes referred to contemplate that notice will be given to the tribes at a much earlier stage of the proceedings than occurred here. Clearly, the urgency to quickly get a dependent child into a safe and nurturing environment will take immediate precedence over a tribe's intervention into the case. The federal statute does not create a 10-day notice rule for a hearing to terminate parental rights but rather a 10-day rule where there is an involuntary proceeding in state court to place the child in foster care or where parental rights may be terminated.[7] The use of the

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[7] There has been a split of authority in California over whether a juvenile court has jurisdiction to consider matters and to make rulings before a tribe receiving ICWA notice has at least 10 days' notice prior to the hearing. (See *In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1267 [jurisdictional defect not to have 10 days' notice to tribe prior to hearing]; *Desiree F., supra,* 83 Cal.App.4th at p. 474 [same]; *In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1410 [failure to give tribe full 10-day notice prior to hearing not jurisdictional].) These authorities are inapposite to this case because here we face the termination of parental rights and the procedural timeline is toward its conclusion. Cases recognize, however, that failure to give proper notice under the ICWA affects an order terminating parental rights and requires remand for compliance with ICWA. (See *In re Brooke C.* (2005) 127 Cal.App.4th 377, 385; *In re Nikki R.* (2003) 106 Cal.App.4th 844, 854-856.)

term "proceedings" would appear to refer generally to dependency proceedings rather than specifically to the hearing in which the court determines whether to terminate parental rights.

More importantly, the juvenile court must determine whether the ICWA applies to a child before terminating parental rights. (*In re E.W.* (2009) 170 Cal.App.4th 396, 403-404; see *In re Karla C.* (2003) 113 Cal.App.4th 166, 178-178.) Although the court's finding can be express or implied (*In re Asia L.* (2003) 107 Cal.App.4th 498, 506; *Levi U.*, *supra*, 78 Cal.App.4th at p. 199), here the juvenile court expressly found the ICWA may apply but failed to find that the ICWA did or did not apply. It is true that the court learned of Hailey's possible Indian heritage toward the end of the dependency case, but this does not excuse compliance with the ICWA. A juvenile court's duty to inquire into a child's Indian status is set forth in section 224.3, subdivision (a) which states: "The court … ha[s] an affirmative and continuing duty to inquire whether a child for whom a petition under Section 300 … has been … filed is or may be an Indian child in all dependency proceedings … if the child is at risk of entering foster care or is in foster care. (§ 224.3, subd. (a); *In re Isaiah W.* (2016) 1 Cal.5th 1, 10-11 (*Isaiah W.*).)

*Isaiah W.* read section 224.3 in conjunction with section 224.3, subdivision (e)(3)[8] which underscores the juvenile court's continuing duty. The latter provision states that after proper notice has been made pursuant to the ICWA and the court has determined 60 days after such notice that the ICWA does not apply, "the court shall reverse its determination of the inapplicability of the [ICWA] and apply the act prospectively if a

[8] Section 224.3, subdivision (e)(3) provides: "If proper and adequate notice has been provided pursuant to Section 224.2, and neither a tribe nor the Bureau of Indian Affairs has provided a determinative response within 60 days after receiving that notice, the court may determine that the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.) does not apply to the proceedings, provided that the court shall reverse its determination of the inapplicability of the Indian Child Welfare Act and apply the act prospectively if a tribe or the Bureau of Indian Affairs subsequently confirms that the child is an Indian child."

tribe or the [BIA] subsequently confirms that the child is an Indian child." (§ 224.3, subd. (e)(3); *Isaiah W.*, *supra*, 1 Cal.5th at p. 11.) *Isaiah W.* reasoned that section 224.3, subdivision (e)(3) implicitly recognizes that any finding of the ICWA's inapplicability prior to proper and adequate notice being given is not conclusive and does not relieve the court of its ongoing duty under section 224.3, subdivision (a) to inquire into a child's Indian status in all dependency proceedings. (*Isaiah W.*, *supra*, 1 Cal.5th at p. 11.)

The agency relies heavily on California Rule of Court, rule 5.482(c)(3) which provides the juvenile court is not required to delay proceedings until a response to notice is received. We agree with mother, however, that this rule contemplates further interim proceedings, not the conclusion of the dependency case with a determination by the court to terminate parental rights. There were few proceedings left for the court to conduct and the agency was well along in its evaluation of suitable adoptive parents. If, for instance, an affected tribe determined to intervene in the case to find an Indian family to adopt Hailey and she was being adopted by another family, the adoption to the non-Indian family would have to be undone. The trial court is obligated to make a finding on the applicability of the ICWA to prevent this sort of scenario. To apply this rule of court to termination of parental rights proceedings would effectively abrogate the ICWA itself as well as related statutes in our Welfare and Institutions Code.

Even under the agency's generous interpretation of the statutes, notice to the Choctaw Tribe was not accomplished until after the hearing to terminate mother's parental rights.[9] We note that mother was incarcerated throughout these proceedings and apparently had little knowledge of her family ancestry. In addition, the more complete genealogy set forth in the third and final set of ICWA notices was not sent to the previously notified tribes until after the trial court had conducted the hearing to terminate

[9] Although a child is treated as having a single tribe under the ICWA, he or she may be eligible for membership in more than one tribe. (*In re Edward H.* (2002) 100 Cal.App.4th 1, 4-6.)

mother's parental rights, making the first two sets of ICWA notices potentially inadequate.[10] (See *In re Breanna S.* (2017) 8 Cal.App.5th 636, 654.) Furthermore, these identified errors appear to be prejudicial to tribal rights. (See *In re E.H.* (2018) 26 Cal.App.5th 1058, 1074-1075.) We therefore reject the agency's argument that it is improper for this court to consider ICWA notices that were sent after the August 6 hearing that led to termination of mother's parental rights. The appropriate remedy is to conditionally reverse the juvenile court's order terminating parental rights to Hailey and to remand to that court to comply with the inquiry and notice provisions of the ICWA. (*In re N.G.* (2018) 27 Cal.App.5th 474, 486.)

**DISPOSITION**

The order terminating parental rights to Hailey M. is conditionally reversed. The case is remanded to the juvenile court with directions to comply with the notice provisions of the ICWA and Welfare and Institutions Code sections 224.2 and 224.3. The court must ensure the agency adds any additional information about Hailey's maternal lineal ancestry and provides new ICWA notices to all potentially affected tribes and the BIA. If any tribe or the BIA determines Hailey is an Indian child, the court shall proceed accordingly. If after receiving ICWA notice and the full statutory time has passed with no response by the tribes or the BIA, or responses are received stating that Hailey is not an Indian child, the order terminating parental rights to Hailey shall be

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[10] Where parents provide vague information concerning tribal identity that cannot be verified through other family members who have been contacted by social services agencies, and the parents or other living family members cannot identify a tribe, the juvenile court has no reason to find the minor was subject to the ICWA. (*Hunter W., supra,* 200 Cal.App.4th at pp. 1467–1468 [family lore is not a basis to find the ICWA applicable]; *In re J.L.* (2017) 10 Cal.App.5th 913, 921–925; *In re J.D.* (2010) 189 Cal.App.4th 118, 123–125*;* [vague assertions of past American Indian heritage insufficient to trigger a duty of further inquiry by the social services agency].) The information provided by the maternal aunt, and later by the more complete family genealogy, was not in the category of vague information concerning tribal identity or affiliation.

immediately reinstated and further proceedings shall be conducted. While the court is awaiting responses from the tribes and the BIA, the agency may continue to conduct any studies or evaluations for adoption that may be appropriate.

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SNAUFFER, J.

WE CONCUR:

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FRANSON, Acting P.J.

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SMITH, J.